Supreme Court, U. S.
FILED
MAY 26 1978
MICHAEL RODAK, JR., CLERK

No. 77-1690

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
*Petitioner,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

---

## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

CHARLES LISTER
PAUL J. BERMAN
888 - 16th Street, N.W.
Washington, D. C. 20006

ALFRED A. GREEN
195 Broadway
New York, New York 10007

EDGAR MAYFIELD
P. O. Box 32, Room 4B-112
Bedminster, New Jersey 07921

*Attorneys for American Telephone and Telegraph Company*

*Of Counsel:*

F. MARK GARLINGHOUSE
195 Broadway
New York, New York 10007

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATUTORY PROVISION INVOLVED | 2 |
| STATEMENT | 3 |
| REASONS FOR GRANTING THE WRIT | 7 |
| CONCLUSION | 11 |


## TABLE OF AUTHORITIES

JUDICIAL DECISIONS:


| | |
|---|---|
| *Atchinson, T. & S.F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800 (1973) | 10 |
| *AT&T* v. *FCC*, 449 F.2d 439 (2d Cir. 1971) | 6, 9 |
| *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir. 1973) | 6, 9 |
| *International Business Machines Corporation* v. *Federal Communications Commission, et al.*, No. 77-1540, October Tern. 1977 | 1 |
| *Johnson* v. *Mountain States Tel. & Tel. Co.*, 48 Utah 330, 159 P. 526 (1916) | 4 |
| *National Ass'n of Motor Bus Owners* v. *FCC*, 460 F.2d 561 (2d Cir. 1972) | 6, 9 |
| *People* v. *New York Tel. Co.*, 175 Misc. 128, 22 N.Y.S.2d 837 (Sup. Ct. Albany Co. 1940), *aff'd*, 262 App. Div. 440, 29 N.Y.S.2d 513 (3d Dept. 1941), *aff'd*, 40 N.E.2d 1020 (1942) | 4 |
| *Public Service Comm'n* v. *FPC*, 511 F.2d 338 (D.C. 1975) | 10 |

Page

*Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954) ..... 10

*United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973) ..... 9

ADMINISTRATIVE DECISIONS:

*In re AT&T*, 2 F.C.C.2d 173 (1956) ..... 9

*In re California Public Utilities Comm'n*, 4 P&F Rad. Reg.2d 498 (1965) ..... 9

*In re Telpak Tariff Sharing*, 31 F.C.C.2d 674 (1971) .. 9

*Notice of Inquiry and Proposed Rule Making*, 47 F.C.C.2d 644 (1974) ..... 3

*Private Wire Contracts*, 50 I.C.C. 731 (1918) ..... 4

*Williams & Calmer, Inc.* v. *Southwestern Bell Tel. Co.*, 70 P.U.R. (n.s.) 35 (Mo. Publ. Serv. Comm'n 1947) ..... 4

STATUTES:

28 U.S.C. § 1254(1) ..... 2

Communications Act, 47 U.S.C. §§ 151, *et seq.* ..... *passim*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

No.

---

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
*Petitioner,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

---

## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

The cross-petitioner, American Telephone and Telegraph Company, prays that, if the Court grants a writ of certiorari in *International Business Machines Corporation* v. *Federal Communications Commission, et al.*, No. 77-1540, October Term 1977, a writ of certiorari also issue to review the closely interrelated questions set forth below, which arise from the same administrative orders and the same judgment and opinion of the United States Court of Appeals for the Second Circuit.

### OPINIONS BELOW

The judgment and opinion of the Court of Appeals appears as Appendix A to the petition for a writ of certiorari in No. 77-1540. The Report and Order of the Federal Communications Commission appears in Ap-

pendix B to that petition. The Commission's Memorandum Opinion and Order on reconsideration appears in Appendix C to that petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1978. On April 24, 1978, Mr. Justice Marshall granted a timely request for an extension of time for the filing of this cross-petition to and including May 26, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in sustaining orders of the Federal Communications Commission which eliminated long-established tariff restrictions on the resale and sharing of private line telecommunications services when, contrary to applicable requirements of the Communications Act, 47 U.S.C. §§ 151, *et seq.*, the Commission did not conduct an evidentiary hearing to resolve substantial and material questions of fact in connection with those orders.

2. Whether the Court of Appeals erred in sustaining orders of the Federal Communications Commission when the Commission did not, and could not on the basis of the record before it, rationally determine whether the elimination of long-established tariff restrictions upon the resale and sharing of private line telecommunications services is just, fair and reasonable.

## STATUTORY PROVISION INVOLVED

Section 205(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 205(a), provides as follows:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

## STATEMENT

This case arises from a proceeding initiated by the Federal Communications Commission in 1974 by a Notice of Inquiry and Proposed Rule Making, 47 F.C.C.2d 644 (1974). The Notice sought written comments addressed principally to the issue whether restrictions upon the resale and sharing of private line telecommunications services should be permitted. The Notice did not contain specific proposals for possible changes in existing requirements, but instead indicated that a First Report and Order would be issued before the Commission made any final determinations.

Restrictions upon resale and sharing have been applicable to private line telecommunications services for as long as such services have been offered. Similar restrictions have been imposed upon other telecommunications services for as long as telecommunications common carriers have existed. Throughout this period, courts and regulatory agencies have frequently sustained the lawfulness of such restrictions.[1] They have held that without restrictions upon resale and sharing layers of intermediaries will be created between common carriers and the ultimate users of their services, and the existence of such intermediaries will hamper the provision of efficient telecommunications services.

In response to the Commission's Notice, AT&T urged that an indiscriminate abolition of all such restrictions would result in severe consequences for both carriers and the public. AT&T submitted an economic impact study which constituted the only economic analysis of the consequences of such changes in the record before the Commission. The study made clear that unrestricted resale and sharing could be expected to alter the rates paid by many business customers, result in the deaveraging of national interstate telephone rates, and cause increased rates to users of intrastate services, including residential telephone subscribers. AT&T urged that such changes should not be permitted to occur without further proceedings, in which the implications of those changes could be evaluated on the basis of an adequate factual record.

---

[1] *E.g.*, Wiliams & Calmer, Inc. v. Southwestern Bell Tel. Co., 70 P.U.R. (n.s.) 35, 42 (Mo. Publ. Serv. Comm'n 1947); People v. New York Tel. Co., 175 Misc. 128, 130, 122 N.Y.S.2d 837, 839 (Sup. Ct. Albany Co. 1940), *aff'd*, 262 App. Div. 440, 29 N.Y.S.2d 513 (3d Dept 1941), *aff'd*, 40 N.E.2d 1020 (1942). *See also* Private Wire Contracts, 50 I.C.C. 731 (1918); Johnson v. Mountain States Tel. & Tel. Co., 48 Utah 330, 159 P. 526 (1916).

Despite the assurance in the Commission's Notice that an interim report would be issued before any final determinations were made, the Commission announced in the Report and Order that it would not conduct any further proceedings. (App. 2b.) No opportunity was afforded the parties for an evidentiary hearing, in which factual questions raised by the Commission's abolition of restrictions upon sharing and resale could be resolved. No proceeding was held in which the economic consequences of such an abolition could be evaluated. Instead, the Commission terminated the proceedings, and adopted a final Report and Order. (App. 111b.)

The Report and Order declares, for the first time in the Commission's history, that all existing restrictions upon sharing and resale of private line communications services are unjust and unreasonable. The Commission found that existing tariff provisions permit selective sharing and resale, and jumped to the conclusion that every such restriction must therefore be in violation of the Communications Act. It reached this result by disregarding decisions by courts and regulatory agencies which have sustained limitations upon sharing and resale, and by relying instead upon cases involving transportation freight forwarding. (App. 42b-43b.) Even the Commission was compelled to concede, however, that freight forwarding and sharing of telecommunications services "may not be completely analogous...." (App. 42b, n.63.)

The Commission did not demand "detailed proof" of the asserted advantages of its new requirements. (App. 76b.) Nor did it attempt to determine the revenue impact of its orders. (App. 50b-52b.) Although the Commission did not dispute that the conduct of a com-

plete and precise economic impact study would have required more time than the Commission had permitted, it announced in conclusory terms that the study submitted by AT&T was "methodologically defective." (App. 57b.) It stated that the assumptions made in AT&T's study regarding customer behavior were not adequately supported, but did not refer to any specific evidence that was contrary to those assumptions, or indicate any of the assumptions upon which its own conclusions were based.

In a separate statement, Commissioner Hooks expressed serious doubts about the reasonableness of the Commission's orders. (App. 149b-150b.) He emphasized that the Commission had rejected AT&T's economic study without providing even "a scintilla of economic data" to buttress its own "theorems." He recognized that the Commission's actions may result in the termination of useful classes of service, and expressed fears that the "cumulative effect" of the Commission's actions may be "unwise."

The Court of Appeals for the Second Circuit sustained the Commission's orders in their entirety. Although the same court had on three previous occasions considered the applicable procedural requirements of the Act, and had, directly or by implication, reached opposite results,[1] the court held that the Commission was not required to conduct evidentiary hearings before prescribing practices as to sharing and resale. It reached that conclusion without pausing to acknowledge, far less to distinguish, its earlier inconsistent de-

---

[1] AT&T v. FCC, 449 F.2d 439 (2d Cir. 1971); National Ass'n of Motor Bus Owners v. FCC, 460 F.2d 561 (2d Cir. 1972); AT&T v. FCC, 487 F.2d 865 (2d Cir. 1973).

cisions. (App. 9a-12a.) With respect to the Commission's inadequate evaluation of the consequences of its orders, the court suggested that AT&T had not "seriously" challenged the Commission's rejection of AT&T's economic impact study (App. 14a), and held that the Commission was not compelled before acting to compute the cost and rate consequences of its orders. (App. 14a-15a.)

## REASONS FOR GRANTING THE WRIT

For reasons described in its brief in opposition, cross-petitioner AT&T believes that review of this controversy by this Court is not required, and it accordingly urges that the petition for certiorari in No. 77-1540 should be denied. If, however, the Court were to determine to grant certiorari there, it should also grant this conditional cross-petition. The questions presented here are inextricably interwoven with those presented in No. 77-1540. They arise from the same administrative orders, reviewed by the same court in a single opinion. Moreover, the administrative decision challenged in this cross-petition is the premise for the decisions challenged in No. 77-1540, and any effort to deal separately with the questions presented in that petition would prevent a complete and meaningful adjudication of this controversy.

The basic decision reached by the Commission in the orders involved here was to prohibit all existing restrictions on resale and sharing of private line services. As a consequence of that decision, the Commission recognized that various changes will occur in the private line telecommunications industry, including, among others, the development of a new "tier" of carriers which will supplement and resell those services to

the public. (App. 72b-73b.) It took various steps intended to take account of those changes. Thus, among other things, the Commission examined the activities and characteristics of resellers, and adopted forms of regulation which it found to be appropriate in the public interest. (App. 87b-101b.) The only issues presented for review by the petition in No. 77-1540 relate to the Commission's decision to regulate resellers as common carriers under the Act.

The premise of the issues presented for review in No. 77-1540 is the Commission's principal decision that it should prohibit all existing restrictions upon the resale of private line services. Without the prohibition of such restrictions, a new "tier" of resellers will not develop and the Commission's regulatory policies with respect to those resellers will have no practical or legal significance. If the Commission's prohibition of such restrictions is invalid, there will be no occasion even to consider the issues presented by IBM in No. 77-1540.

Serious doubts exist as to the validity of the Commission's order prohibiting restrictions upon resale and sharing. Even the Commission concedes that its order constitutes a "prescription" of carrier practices.[2] Its authority to make such prescriptions is derived from Section 205(a) of the Communications Act, 47 U.S.C. § 205(a). Both the Commission and the Court of Appeals have previously held that prescriptions may be made under Section 205(a) only if evidentiary hearings are held to resolve disputed questions of ma-

---

[2] The Report and Order described the Commission's action as a prescription (A. 42b), and the Commission conceded in papers submitted to the Court of Appeals that it had prescribed a carrier practice. *Memorandum in Opposition to Motion for Stay Pending Judicial Review*, at 15 (Mar. 17, 1977).

terial fact.[3] The Commission's refusal to conduct such hearings in this case raises substantial doubts as to the validity of its prohibition against resale and sharing restrictions.

Those doubts are magnified by the Court of Appeals' sweeping interpretation of the decision of this Court in *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224 (1973). The court below disregarded the unusual circumstances involved in *Florida East Coast*,[4] and derived from it a "touchstone test" for the resolution of procedural issues in a wide range of situations. (App. 10a.) It ignored this Court's recognition that the word "hearing" may have a "host of meanings," as well as the Court's refusal to provide precise or talismanic standards for determining the proper meaning in each case. *Id.* at 239.

---

[3] The Commission previously recognized that evidentiary hearings are required to resolve factual disputes under Section 205(a) in, for example, In re AT&T, 2 F.C.C.2d 173, 177-178 (1976); In re California Public Utilities Comm'n, 4 P&F Rad.Reg.2d 498, 501 (1965); In re Telpak Tariff Sharing, 31 F.C.C.2d 674, 675 (1971). The Court of Appeals, directly or by implication, reached the same conclusion in AT&T v. FCC, *supra*, 449 F.2d 439; National Ass'n of Motor Bus Owners v. FCC, *supra*; AT&T v. FCC, *supra*, 487 F.2d 865.

[4] Among other things, this Court emphasized in *Florida East Coast* that the procedural requirements applicable there arose out of repeated and detailed congressional scrutiny, in which Congress left no doubt that it expected prompt action to remedy a particular crisis. *Supra*, 410 U.S. at 230-34. Moreover, Congress acted there in part after the adoption of the Administrative Procedure Act, and its choice of words could be attributed special significance in light of that Act's terms. *Id.* at 234-38. In contrast, Section 205(a) was adopted long before the Administrative Procedure Act, and has not since been altered in any relevant respect.

Moreover, the Commission's prohibition against resale and sharing restrictions was not based upon a meaningful evaluation of the consequences of its orders. The Commission disregarded its duty to explain and justify its departure from "prior norms" and thus prevented a genuine assessment of the bases of its orders or the consistency of its actions with the requirements of the Communications Act. *Atchison, T. & S.F. R. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800, 808 (1973). *See also Secretary of Agriculture* v. *United States,* 347 U.S. 645, 653 (1954). Its failure even to attempt to analyze the revenue and service consequences of its orders meant that it did not "give reasoned consideration to the ultimate issue presented—the balancing between the costs and benefits." *Public Service Comm'n* v. *FCC,* 511 F.2d 338, 349 (D.C. Cir. 1975).

These serious questions as to the validity of the Commission's underlying prohibition against resale restrictions make clear that, if certiorari is granted in No. 77-1540, it should also be granted here. The questions presented there are collateral and subsidiary to the basic regulatory decision involved here. Unlike the questions presented here, those questions are, as shown by AT&T's brief in opposition, either premature or involve matters as to which the Commission is strongly supported by long-established administrative practice. In addition, if the Court were to hold that the Commission's principal decision is invalid, there would be no need even to consider the issues presented by No. 77-1540. In these circumstances, any effort to review the issues presented there without also reviewing those involved here would prevent a full and meaningful evaluation of this controversy.

## CONCLUSION

For reasons set forth above, cross-petitioner urges that if, contrary to its submission, the petition for certiorari in No. 77-1540 were to be granted, this cross-petition should also be granted. If the petition in No. 77-1540 is denied, this conditional cross-petition should also be denied.

Respectfully submitted,

CHARLES LISTER
PAUL J. BERMAN
888 - 16th Street, N.W.
Washington, D. C. 20006

ALFRED A. GREEN
195 Broadway
New York, New York 10007

EDGAR MAYFIELD
P. O. Box 32, Room 4B-112
Bedminster, New Jersey 07921

*Attorneys for American Telephone and Telegraph Company*

*Of Counsel:*

F. MARK GARLINGHOUSE
195 Broadway
New York, New York 10007

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.
FILED
JUL 17 1978
MICHAEL RODAK, JR., CLERK

**No. 77-1690**

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

**On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR RESPONDENT INTERNATIONAL BUSINESS MACHINES CORPORATION IN OPPOSITION

DAVID R. ANDERSON
WILLIAM T. LAKE
ROGER M. WITTEN
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

THOMAS D. BARR
ROBERT F. MULLEN
RONALD S. ROLFE
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005

*Attorneys for Petitioner International Business Machines Corporation*

*Of Counsel:*

J. GORDON WALTER
International Business Machines Corporation
Old Orchard Road
Armonk, New York 10504

July 17, 1978

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 77-1690

---

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

---

**On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## BRIEF FOR RESPONDENT INTERNATIONAL BUSINESS MACHINES CORPORATION IN OPPOSITION

---

## QUESTIONS PRESENTED

In a rulemaking proceeding, after three rounds of written comments and extensive petitions for reconsideration involving at least 43 parties, the Federal Communications Commission ("Commission") ruled that telephone common carriers should not be allowed to prohibit the resale or sharing of their transmission services. The questions presented are:

1. Was it unlawful for the Commission to issue this ruling without conducting trial-type hearings?

2. Was the Commission's ruling arbitrary, capricious, or an abuse of discretion?

## STATEMENT OF THE CASE

The case is described in IBM's petition for certiorari in No. 77-1540. Briefly, the Commission engaged in rulemaking to decide whether to permit the creation of a new class of entities in the telephone industry—"resellers," who would buy private line telephone transmission services from telephone companies and resell them to the public, but would not themselves operate transmission facilities. Such resale activity had previously been barred by provisions in telephone company tariffs. After three years of proceedings, the Commission ruled that the public interest would be served by putting an end to those prohibitions.[1]

The Commission gave interested parties ample opportunity to express their views in the rulemaking proceeding. It invited and received three rounds of written comments, which ultimately totaled more than 4,300 pages. AT&T participated at each stage, as one of at least 43 parties.

---

[1] In starting the proceeding, the Commission noted that a second issue was also presented: whether, if resale was allowed, it would be desirable to regulate resellers as common carriers. *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Notice of Inquiry and Proposed Rulemaking*, 47 F.C.C.2d 644, 656-57 (1974).

However, the Commission in effect failed to decide that issue. It ruled that it is legally compelled to regulate resellers, because it believes they fall within the definition of "common carrier" in the Communications Act, 47 U.S.C. § 153(h). The Commission thus did not decide whether such regulation would be in the public interest. The Commission's legal error in holding that it must regulate resellers is the subject of IBM's petition for certiorari in No. 77-1540.

After considering the three rounds of comments, the Commission issued its *Initial Order*, declaring that telephone companies providing private line services may no longer restrict the resale or sharing of those services.[2] AT&T and other parties then filed extensive petitions for reconsideration. After considering those petitions, the Commission released an *Order on Reconsideration*, which reaffirmed the principal conclusions of the *Initial Order* but modified that order in respects not here relevant.[3]

AT&T and others sought review of the Commission's orders in the United States Court of Appeals for the Second Circuit. That court affirmed the orders in all respects.[4]

## ARGUMENT

### A. The Questions Raised by AT&T's Cross-Petition Are Insubstantial.

AT&T seeks a writ of certiorari to argue that the Commission's notice and comment rulemaking procedure was inadequate. AT&T asserts that the Commission, besides considering the extensive written comments, was required to hold a trial-type evidentiary hearing. AT&T further suggests that the Commission's decision is arbitrary and capricious because the record did not enable the Commission to predict with certainty the future consequences of its orders. As the court below held, those arguments are foreclosed by well-settled law. This Court has recently and frequently rejected the positions AT&T seeks to argue.

---

[2] *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), App. B to IBM's petition for certiorari in No. 77-1540.

[3] 62 F.C.C.2d 588 (1977), App. C to IBM's petition for certiorari in No. 77-1540.

[4] App. A to IBM's petition for certiorari in No. 77-1540.

The notice and comment rulemaking procedure used by the Commission was correct under the Administrative Procedure Act ("APA")[5] and the Communications Act.[6] The APA establishes notice and comment as the normal procedure in a rulemaking, and requires a trial-type hearing only where another statute specifically requires a decision to be made "on the record." *United States* v. *Florida East Coast Railway*, 410 U.S. 224 (1973). Because Section 205 (a) of the Communications Act contains no such requirement,[7] this case does not come within the APA's narrow exception to normal rulemaking procedures.

Moreover, the notice and comment procedure is particularly appropriate for rulemakings, such as this one, in which an agency formulates new policies of prospective, industry-wide application. The Commission here was considering a broad policy issue, whether to authorize the creation of a new class of entities that would act as intermediaries between telephone companies and consumers. Its orders, which are prospective only, apply to *all* communications carriers offering any type of private line services. And the issues of "legislative" fact that were before the Commission—which involved predicting the future effects of resale on the development of telecommunications[8]—were unsuited to a trial-type hearing.[9] "[T]he very basic tenet of administrative law that agencies should be free to fashion their own rules of proce-

---

[5] *See* 5 U.S.C. § 553(c).

[6] *See* 47 U.S.C. § 205(a).

[7] Section 205(a) requires only that the Commission act "after full opportunity for hearing." 47 U.S.C. § 205(a).

[8] *See Initial Order*, 60 F.C.C.2d at 298-303, 272-74, App. B at 68b-76b, 21b-25b.

[9] *See, e.g., Bell Telephone Co.* v. *FCC*, 503 F.2d 1250, 1268 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *American Airlines, Inc.* v. *CAB*, 359 F.2d 624, 633 (D.C. Cir.) (*en banc*), *cert. denied*, 385 U.S. 843 (1966).

dure" [10] supports the Commission's choice of a notice and comment procedure here.

Nor can the Commission's orders be found to be "arbitrary, capricious, [or] an abuse of discretion," the controlling standard under the APA.[11] The Commission's orders amply discuss the factors relevant to its decision and articulate a rational connection between the facts found and the choices it made.[12] To require the Commission to determine with certainty how its new policies will work would produce, in Judge Friendly's words,

> "an unhappy state of affairs wherein efforts by parties, agencies, and courts to attain an unattainable certainty result in such giant delays as to produce the worst of all possible worlds." [13]

This Court recently noted that, if agencies were required to support their rules with "the type of record produced only after a full adjudicatory hearing," they would be forced always to hold such hearings and "all the inherent advantages of informal rulemaking would be totally lost." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 46 U.S.L.W. 4301, 4308 (U.S. April 3, 1978). The Court reconfirmed that the APA imposes no such requirement.

The decision below merely applied these settled principles to the facts of this case. AT&T's challenge to that decision raises no issue worthy of review in this Court.

---

[10] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 46 U.S.L.W. 4301, 4307 (U.S. April 3, 1978).

[11] 5 U.S.C. § 706(2)(A); *see FCC* v. *National Citizens Committee for Broadcasting*, 46 U.S.L.W. 4609, 4616-20 (U.S. June 12, 1978).

[12] *See, e.g., Initial Order*, 60 F.C.C.2d at 280-85, 291-93, 298-303, App. B at 35b-45b, 55b-59b, 68b-76b; *Order on Reconsideration*, 62 F.C.C.2d at 592, 594-97, App. C at 9c, 12c-19c.

[13] *In re Penn Cent. Transp. Co.*, 384 F. Supp. 895, 931-32 n.72 (Spec. Ct. R.R.R.A. 1974).

### B. AT&T's Procedural Arguments Are Unrelated to the Substantial Issues Raised by IBM's Petition.

The procedural issues AT&T seeks to raise are unrelated to the issues posed by IBM's petition in No. 77-1540. AT&T's arguments relate exclusively to the rulemaking procedure used by the Commission in deciding that resale should be permitted. As we have shown, those arguments do not merit review here. IBM's petition raises the entirely distinct question whether, assuming that resale is permitted, the Commission is compelled by law to regulate resellers as common carriers. A decision by the Court on that question would in no way implicate AT&T's procedural arguments. Should the Court decide to grant IBM's petition, there would still be no reason for it to review the insubstantial issues AT&T seeks to raise.

## CONCLUSION

AT&T's conditional cross-petition for certiorari should be denied, regardless of the Court's disposition of IBM's petition for certiorari in No. 77-1540.

Respectfully submitted,

DAVID R. ANDERSON
WILLIAM T. LAKE
ROGER M. WITTEN
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

THOMAS D. BARR
ROBERT F. MULLEN
RONALD S. ROLFE
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005

*Attorneys for Petitioner International Business Machines Corporation*

*Of Counsel:*

J. GORDON WALTER
International Business
Machines Corporation
Old Orchard Road
Armonk, New York 10504

July 17, 1978

Supreme Court, U. S.
FILED
JUL 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1690

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

*Petitioner,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

*Respondents.*

## BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN PETROLEUM INSTITUTE

WAYNE V. BLACK
LARRY S. SOLOMON
CHRISTINE A. MEAGHER
KELLER & HECKMAN
1150 - 17th Street, N.W.
Washington, D.C. 20036
*Attorneys for Respondent, American Petroleum Institute.*

July 17, 1978

Washington, D.C. • THIEL PRESS • (202) 638-4521

## TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . 1

STATEMENT OF THE CASE . . . . . 2

ARGUMENT

I. The Decision Below is Consistent with Federal and Supreme Court Decisions Dealing with the Hearing Issue and with Past Administrative Practice of the Federal Communications Commission . . . . . 5

II. The Issues Raised by Cross-Petitioner are Separate and Distinct from those Raised in No. 77-1540 . . . . . 9

CONCLUSION . . . . . 11

## TABLE OF AUTHORITIES

*Judicial Decisions:*

*American Telephone and Telegraph Company v. FCC*, 487 F.2d 865 (2d Cir. 1973) . . . . . 6

*American Telephone and Telegraph Company v. FCC*, 449 F.2d 439 (2d Cir. 1971) . . . . . 6, 7

*Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973) . . . . . 9

*Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) . . . . . 7

*Davis v. Mississippi*, 393 U.S. 821 (1968) . . . . . 11

*Gregg v. United States*, 393 U.S. 932 (1968) . . . . . 11

*National Association of Motor Bus Owners v. FCC*, 460 F.2d 561 (2d Cir. 1972) . . . . . 6

*North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977) *cert. denied*, 98 S.Ct. 222 (1977) . . . . . 8

*In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) . . . . 9

*Judicial Decisions, continued:* Page

*RCA Global Communications, Inc. v. FCC*, 559 F.2d 881 (2d Cir. 1977) . . . . . 7

*Regal Knitwear Co. v. N.L.R.B.*, 323 U.S. 692 (1944) . . . . . 11

*United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973) . . . . . 7, 8

*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 98 S.Ct. 1197 (1978) . . . . . 8

*Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1975) *cert. denied*, 423 U.S. 836 (1975) . . . . . 6

*Administrative Decisions:*

*In the Matter of AT&T High Density - Low Density Rate Structure*, 45 FCC 2d 88 (1974) . . . . . 6

*In the Matter of Bell System Tariff Offerings of Local Distribution on Facilities for Use by Other Common Carriers*, 46 FCC 2d 413 (1974) . . . . . 6

*Notice of Inquiry and Proposed Rulemaking, Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 47 FCC 2d 644 (1974) . . . . . 1, 3

*Report and Order, Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976) . . . . . 2

*Memorandum Opinion and Order, Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 62 FCC 2d 588 (1977) . . . . . 3

*Specialized Common Carrier Inquiry*, 29 FCC 2d 870 (1971) . . . . . 6

*Statutes:*

Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.* . . . . . *passim*

*Statutes, continued:* Page

Interstate Commerce Act
49 U.S.C. §1(14)(a) . . . . . 8

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

---

**No. 77-1690**

---

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

*Petitioner,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

*Respondents.*

---

## BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN PETROLEUM INSTITUTE

---

### QUESTION PRESENTED

Whether the Court of Appeals acted properly in affirming orders of the Federal Communications Commission which implemented a policy of unlimited resale and sharing of private line communications services when those orders were promulgated pursuant to notice and comment hearing procedures, and were based on reasoned consideration and substantial evidence?

## STATEMENT OF THE CASE

The Federal Communications Commission ("FCC" or "Commission") commenced this proceeding to consider the lawfulness of common carriers tariff provisions which permitted subscribers to engage in sharing and resale of private line communication services, but denied these same privileges to other subscribers.[1] These selective restrictions were initiated by the carriers, and they had never been called upon to justify such provisions. This proceeding represented one of the first attempts by the FCC to examine the lawfulness of these restrictions under the Communications Act of 1934, as amended. 47 U.S.C. §151 *et. seq.* ("Act") (App. B, 5b.)[2] The impetus for the FCC's inquiry came in large part from the urgings of various parties who desired to engage in resale and sharing but were prohibited from doing so under existing tariffs.

At the outset of the proceeding, the Commission explained:

> The nature of the issues that must be considered, their complexity, their basic impact on the overall structure of the industry, the number and diversity of parties interested in the issues as well as the expedition with which they must be resolved compels the conclusion that the fulfillment of our regulatory mandate requires that the questions that have been raised in the context of various discrete mat-

---

[1] *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Notice of Inquiry and Proposed Rulemaking ("Notice")*, 47 F.C.C.2d 644 (1974).

[2] Contrary to the allegations of cross-petitioner American Telephone and Telegraph Company (AT&T), no authority has been cited which indicates that either the FCC or any federal court has ever sustained the lawfulness of resale and sharing restrictions.

ters before us be considered in a broad rulemaking proceeding.[3]

The Commission further indicated that the basic issues in the proceeding could be divided into two separate and distinct questions, namely: (1) whether the selective prohibitions against resale and sharing were just, reasonable and non-discriminatory; and, (2) whether, and to what extent the Commission should regulate shared use arrangements and resale operations.[4]

The FCC conducted proceedings which involved six rounds of evidentiary submissions by interested parties. Based on the record, the Commission found that existing restrictions on resale and sharing of communication services were unjust, unreasonable and unlawfully discriminatory under the Act.[5] (App. B, 6b-8b, 39b-52b.) After weighing the potential adverse impact of its decision and the countervailing benefits, the Commission found that permitting unlimited resale and sharing was just and reasonable. In order to make the perceived benefits generally available, the Commission adopted this communications policy for application, prospectively, throughout the entire industry.

---

[3]*Notice, supra,* 47 F.C.C.2d at 645, cited in *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities ("Report and Order")*, 60 F.C.C.2d 261 (1976), reproduced in the Appendix to No. 77-1540 ("App.") App. B, 14b.

[4]Selective "resale" and "shared use" arrangements were permitted under AT&T tariffs at the time this proceeding was initiated. *See, e.g. Report and Order* App. B, 131b-135b.

[5]The Commission indicated that if experience proved there was any sizeable shift of revenue requirements as a result of its action, a proceeding dealing with that issue would be initiated. *In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Memorandum Opinion and Order*, 62 F.C.C.2d 588 (1977). (App. C, 17c.)

On the issue of regulating sharing and resale, the Commission found that sharing was not a common carrier activity and therefore need not be regulated as such. However, resale activities were deemed to be common carriage requiring appropriate regulation under Title II of the Act. (App. B, 92b-101b.)

The court below, the United States Court of Appeals for the Second Circuit, upheld the Commission's orders in their entirety. It concluded that the Commission, acting in a rule making capacity, was not required to hold a "trial-type" hearing, and that notice and comment procedures were appropriate to resolve the issues in this proceeding. (App. A, 9a-12a.) The court also found that the Commission's orders were supported by substantial evidence and based on a reasoned consideration of that evidence. (App. A, 13a.) Additionally, the Court indicated that where carrier-initiated tariffs were found to be unlawful, the FCC was not bound to conduct exhaustive economic impact studies before taking action. As the Court explained: "The FCC may institute broad policy changes while leaving for future proceedings the fine tuning of the rate structure required to adjust for the economic impact of those changes." (App. A, 15a.)

International Business Machines Corporation ("IBM") filed a petition for a writ of certiorari, No. 77-1540, seeking review of the narrow question of whether resellers of communications services should be regulated as common carriers. Although AT&T opposed that petition, it nevertheless filed a conditional cross-petition for a writ of certiorari seeking review of additional issues.

## ARGUMENT

The cross-petition does not present issues worthy of review by this Court.[6] Cross-petitioner AT&T concedes as much by advocating that this Court should not review the decision below. (AT&T Brief in Opposition in No. 77-1540.) Furthermore, there is no interrelationship between the issues presented for review in the two petitions. Therefore, this Court need not grant AT&T's Petition solely on its alleged relationship to No. 77-1540.

The bases on which Cross-Petitioner AT&T rests its argument for review by this Court are the alleged "serious" and "substantial doubts" that exist regarding the validity of the Commission's orders. These contentions seriously mistake the history of FCC policy making proceedings and relevant decisions of this Court.

### I.

### THE DECISION BELOW IS CONSISTENT WITH FEDERAL AND SUPREME COURT DECISIONS DEALING WITH THE HEARING ISSUE AND WITH PAST ADMINISTRATIVE PRACTICE OF THE FEDERAL COMMUNICATIONS COMMISSION

After a thorough analysis of the appropriate statutory hearing requirements and relevant case law, the FCC concluded that a trial-type hearing was not required in a proceeding which primarily addressed general policy issues of a prospective nature, applicable to an entire industry. (App. B, 118b-131b.) Additionally, the Commission indicated that the selected "notice and comment" procedures were consistent with its practice in similar proceedings

---

[6]This Brief in Opposition is intended to demonstrate why the conditional cross-petition filed by AT&T (No. 77-1690) should be denied. It is not intended to take any position on the issues raised in No. 77-1540.

and would be most conducive to a thorough examination of the issues.[7]

AT&T asserts that "evidentiary hearings"[8] were required in this proceeding to meet the requirements of Section 205(a) of the Act. As authority for this proposition, AT&T cites procedures followed by the FCC in two ratemaking proceedings. AT&T's analogy to ratemaking proceedings is inappropriate since, in this proceeding, the FCC was considering broad policy issues and specifically reserved the issue of rates for a separate proceeding, if necessary. (App. C, 17c.)[9]

Contrary to cross-petitioner's assertion, the Second Circuit has not reached conflicting conclusions on the question of the type of hearing procedures required under Section 205(a) of the Act. The three Second Circuit cases cited by AT&T[10] do not consider the issue of the type of "hearing" required by Section 205(a). Furthermore, these cases involved the prescription of rates

---

[7] *In the Matter of AT&T High Density - Low Density Rate Structure*, 45 F.C.C.2d 88 (1974); *In the Matter of Bell System Tariff Offerings of Local Distribution Facilities For Use By Other Common Carriers*, 46 F.C.C.2d 413, 418-19 (1974); First Report and Order, *Specialized Common Carrier Inquiry*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Util. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975).

[8] Cross-Petitioner never explains what it means by "evidentiary hearings," nor does it explain why the proceedings of the FCC did not constitute an evidentiary hearing.

[9] The Court of Appeals recognized that the FCC was acting in a rulemaking capacity pointing out that this proceeding involved policy and legialtive-type issues, which "cannot be decisively resolved by testimony." (App. A, 12a.)

[10] *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973); *National Association of Motor Bus Owners v. FCC*, 460 F.2d 561 (2d Cir. 1972); and *AT&T v. FCC*, 449 F.2d 439 (2d Cir. 1971).

which is not an issue in the instant proceeding.[11] Faced for the first time in this case with the question of the type of hearing required under Section 205(a) in policy making proceedings, the Court of Appeals found that the "notice and comment" procedures followed in this instance met the applicable hearing requirements.

The Court of Appeal's decision is also consistent with its previous interpretation, and that of the Third Circuit, of similar hearing provisions under other sections of the Communications Act.[12] The decision in this case, therefore, is consistent with well established administrative and judicial precedent.

Contrary to AT&T's next assertion, the court below has not misinterpreted this Court's ruling in *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). AT&T characterizes the Court of Appeals' interpretation of *Florida East Coast* as "sweeping", and finds an apparent disregard for this Court's recognition that the word "hearing" may have a "host of meanings". However, cross-petitioner fails to identify how the Court of Appeals' analysis of the hearing issue "conflicts" with the decision in *Florida East Coast.*

In *Florida East Coast*, this Court held that trial-type hearings were not required under provisions of the Inter-

---

[11] In *AT&T v. FCC, supra* at 449 F.2d 439, the court held that since prescribing unlimited sharing of AT&T's bulk rate offering would have the effect of a rate reduction, the FCC must make a finding that its prescription of a lower rate was just, fair and reasonable under the Act.

[12] *RCA Global Communications, Inc. v. F.C.C.*, 559 F.2d 881 (2d Cir. 1977) holding that the "full hearing" requirement found in Section 222(e)(3) could be satisfied by "notice and comment" proceedings; *Bell Telephone Co. of Pennsylvania v. F.C.C.*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) holding that the requirement of "opportunity for hearing" in Section 201(a) was satisfied by "notice and comment" procedures.

state Commence Act[13] similar to the Communications Act provisions under review by the court below. *Florida East Coast* recognized, as did the Court of Appeals, that adjudicatory procedures are not necessary to formulate a basically legislative-type judgment for prospective application. *Id.* at 410 U.S. 247.[14] Since Section 205(a) did not require that a hearing be "on the record," and there was no independent statutory basis requiring adjudicatory procedures, the court below properly found, in accordance with *Florida East Coast,* that a trial-type hearing was not required.

The ultimate issue in this proceeding is not, as AT&T purports, the economic impact of the FCC's decision, but whether resale and sharing restrictions are lawful, and how resale and sharing should be regulated to assure compliance with the Communications Act. Despite AT&T's contention, the Commission does not have a duty to exhaustively review the financial impact of its decision. The court below, citing the recent decision of the Fourth Circiut Court of Appeals on this same issue in *North Carolina Utilities Commission v. F.C.C.* 552 F.2d 1036 (4th Cir. 1977), *cert. denied,* 98 S.Ct. 222 (1977), found that the FCC was not required to "conduct exhaustive economic impact studies before taking action", and that in any event, its decision was fully supported by reasoned consideration and substantial evidence. (App. A, 13a-15a.) In so holding the court below followed well established

---

[13] 49 U.S.C. §1(14)(a).

[14] The court's decision below is also in accord with this Court's recent holding in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 98 S.Ct. 1197 (1978) which recognizes an agency's broad discretion to fashion its own procedures to carry out its statutory duties.

principles for judicial review of agency action. *See, In re Permian Basin Area Rate Cases,* 390 U.S. 747 (1968).

Nor does *Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade,* 412 U.S. 800 (1973), cited by AT&T, stand for the proposition that an agency must undertake an exhaustive economic analysis to meet its burden of justifying its decisions with substantial evidence and reasoned consideration. That case holds, rather, than an agency must explain with reasonable thoroughness the basis for a change in policy. Therefore, the court below applied the proper standard for review of the FCC's decision.

## II.

### THE ISSUES RAISED BY CROSS-PETITIONER ARE SEPARATE AND DISTINCT FROM THOSE RAISED IN NO. 77-1540

The Commission originally formulated two basic issues to be addressed in this proceeding. One involved the lawfulness of existing tariff restrictions on resale and sharing imposed by the carriers. The second concerned whether and to what extent the Commission should regulate resale and shared use arrangements. (App. 13b-14b.) The Commission's orders explained that each of these issues was significant in its own right, but that it would undertake the resolution of both these issues in one broad rulemaking proceeding. (App. B, 14b.)

AT&T mischaracterizes the relationship between the issues presented. Dealing with these issues separately would *not* prevent, as AT&T alleges, a complete and meaningful adjudication of this controversy. The basic flaw in AT&T's logic is that it improperly assumes that there is a dependent relationship between the procedures followed by the Commission in prescribing a policy of unlimited resale and sharing, and those followed in

deciding that resellers will be regulated as common carriers. No such dependent relationship exists merely because two distinct policy decisions, based on totally different considerations, are reached in the same proceeding. The Commission's policy determinations were discussed in separate and independent sections of its orders with no indication whatsoever that the decision to regulate resellers was premised on any factor other than its finding that resellers were common carriers. The decision of the Second Circuit affirmed the Commission's two policy determinations, in separate sections of its opinion, and based its affirmance on individual and independent reasons. (App. A, 9a-21a.)

Furthermore, certain selected groups were already allowed to engage in resale activities under existing tariffs at the time this proceeding began. (App. B, 131b-148b.) The Commission could have initiated a proceeding concerning the regulation of these groups without considering, at the same time, the lawfulness of the tariff restrictions themselves. The Commission's decision to regulate resellers in this proceeding was not "premised" on its action concerning tariff restrictions, and therefore these issues need not be considered together.

Finally, this Court can exercise its discretion and consider only those issues in a particular case which are worthy of review. Review of issues presented on a writ of certiorari is not a matter of right, but of sound judicial discretion. Just as this discretion operates in deciding which cases are to be reviewed, it can also operate to select the issues to be argued and decided in a particular case. This practice enables the Court to direct its atten-

tion to those issues worthy of review, and discard those issues which do not require review.[15]

## CONCLUSION

For the reasons stated above, the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

WAYNE V. BLACK
LARRY S. SOLOMON
CHRISTINE A. MEAGHER
KELLER & HECKMAN
1150-17th Street, N.W.
Washington, D.C. 20036
*Attorneys for Respondent,*
*American Petroleum Institute.*

July 17, 1978

---

[15] *See, e.g., Gregg v. United States*, 393 U.S. 932 (1968); *Davis v. Mississippi*, 393 U.S. 821 (1968); and *Regal Knitwear Co. v. N.L.R.B.*, 323 U.S. 692 (1944) wherein this Court limited the granting of a writ of certiorari to specific issues in each case.